IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 431

IRVING E. MORRIS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

PETITIONER'S REPLY TO BRIEF OF UNITED STATES.

The petitioner replies herewith to the points as they appear in the government's answer.

STATEMENT OF FACTS.

The government's statement of facts (Gov't. Br. 2-10) is not, we think, unreasonable, although it adds little or nothing to the facts as stated in our brief. We do disagree with the assertion (Gov't. Br. 4) that Richter testified he overheard a conversation between petitioner Morris, Aldrich, and Dixie Richmond the alleged co-conspirator, the testimony being instead that Richmond was merely present at the same bar, but it does not appear that he was a party to any transaction that allegedly transpired then between Aldrich and Morris (R. 25-26).

I.

The judge confused the jury with his remarks regarding declarations of alleged co-conspirators in conspiracy cases and in effect directed a verdict against the petitioner (Gov't. Br. 11-14, Pet. 9-23).

The government's answer to our petition is in the nature of a confession and avoidance.

We agree with the government that it was appropriate for the trial judge to rule on the admissibility of evidence (Gov't. Br. 11) but we question the soundness of the government's contention that it was proper for the judge to indicate to the jury his reasons for his rulings "so as to avoid misunderstandings" (Gov't. Br. 11). We contend that the judge's remarks did not have the effect of avoiding, but rather the effect of creating misunderstandings.

The government seems to go along with our view as to the initial impropriety of the judge's comments, *e.g.*:

> "Not every such . . . comment . . . was [an] . . . exact statement of the law . . ." (Gov't. Br. 11)

"This last remark, admittedly inaccurate, was made . . . when the judge . . ." (Gov't. Br. 12).

". . . The judge promptly corrected himself . . ." (Gov't. Br. 13).

"The slip of the tongue by which the judge said . . ." (Gov't. Br. 15, n. 5).

The government relies on the bromide that the trial court having finally instructed properly at the conclusion of the case, petitioner was not really injured by what the government is constrained to call the court's "incidental remarks" (Gov't. Br. 11-12).

But we object that the trial was erroneously encumbered with inaccurate, misleading and prejudicial comments by the trial court. The government charges us with "picking apart" the record (Gov't. Br. 12). We venture to suggest that if your Honors were to thumb the record at random, you would observe a case extraordinary for the amount of incidental, unnecessary and inaccurate comment by the trial judge.

The government seeks to avoid the effect of one remark on the ground that, although inaccurate, it occurred early in the trial, when the judge was excluding, and not admitting evidence (Gov't. Br. 12). The comment in question sought to bind petitioner with declarations of individuals not in the *same* conspiracy, but in the same *kind* of conspiracy (R. 27). If the trial court misleads the jury, we fail to see what possible difference it could make as to whether he were admitting or excluding evidence at the time.

The government suggests (Gov't. Br. 12) that because another remark by the court (R. 191) was directed in part to the fact that a conspiracy did *not* exist between petitioner and Richter (a government witness) the jury could just walk away from that part of his remark which indicated that he, the judge, had already decided that a con-

spiracy had existed between petitioner and Richmond, his alleged co-conspirator.

The government says that we ought not complain of the judge's remark that statements of an alleged co-conspirator would be binding on petitioner merely if they were made (R. 239, Gov't. Br. 13) because four record pages previous to that remark, the judge told the jury that it was for them to decide whether certain evidence was sufficient to prove a conspiracy. But if this Court will examine those previous remarks of the trial judge (R. 235) extracted by the government (Gov't. Br. 13), the court will observe that the remarks of the trial judge at p. 235 of the Record are hopelessly confusing. He tells the jury that it ". . . might, has a right . . ." to consider "certain" evidence and it is for the jury to decide whether the unidentified "other" evidence has a certain effect. The trial court's remarks which the government contends are palliative of the error at R. 239 are so confused and confusing as to require correction themselves. But in no event do they cure the error of which we complain, *viz.*, that the jury was instructed to bind petitioner with remarks of his co-defendant, merely if they were made (R. 239).

Again, the government relies upon the supposed effect of the court's remarks at R. 243 as curative of this error (Gov't. Br. 13). There the court stated that it was for the jury to determine the effect of certain testimony, and in the course of his statement, advised the jury:

> "You heard the testimony. It is up to you to believe it. . . ." (R. 243).

The government sets out (Gov't. Br. 10, top) what it maintains (Gov't. Br. 13) to have been a statement by the judge which cured the prior error. But again, the supposedly remedial remarks were themselves erroneous. Government witness Richter was testifying to an alleged long distance tele-

phone conversation with one Richmond, in which Richmond said he had sent the witness a sample of counterfeit. (R. 242). The court, upon objection, ruled that it was a question for the jury whether or not the conversation took place, and whether or not it applied to the petitioner. But the jury was erroneously not further advised that the conversation could apply to the petitioner only if it were during and in furtherance of a conspiracy in which both Richter and petitioner were members. Thus as the instruction was given, the jury was, at that time, free to believe that they could apply or not apply the testimony to the petitioner within their uncontrolled discretion.

The government admits (Gov't. Br. 11) that not all the judge's incidental comments were complete and exact statements of the law. We complain that they were so numerous, so incomplete, and so inexact that the jury must assuredly have been circumscribed by utter confusion while listening to the testimony. The government apparently contends that although the judge gave befuddling misstatements of law throughout the trial, the correct instructions given at the termination thereof constituted a sufficient guide to lead the jury through the maze the judge previously had sponsored.

The government contends (Gov't. Br. 14) that petitioner ought not complain of the effect of statements of his alleged co-conspirator out of his presence because he was not mentioned by name in those statements. Accordingly, says the government, all that the declarations tended to show were "the arrangements for and the passing of the counterfeit money, *i.e.* that the substantive offenses had occurred." We think it is a complete answer to observe that part of the *corpus delicti* of the conspiracy was thus demonstrated by the hearsay declarations, *i.e.*, that the *object* of the supposed conspiracy was illegal, as required

in order to be violative of Section 371, Title 18, U.S. Code. Furthermore, the court did not instruct the jury that the declarations could only be considered as to the substantive offenses, and, if the court had so instructed the jury, it would have been patent error. In short, the declarations affected the conspiracy count of which petitioner stood accused, and the jury ought not improperly to have been advised of their application throughout the trial.

II.

The trial judge advised the jury that should he permit them to decide the case, it was because he had determined the defendant's guilt beyond a reasonable doubt. (Gov't. Br. 15-16, Pet. 25-26).

The government sets out certain language of the trial court at pp. 15 and 16 of its brief and states that:

> "The most that can be inferred from such language and the failure to direct a verdict is that the government had presented a prima facie case," (Gov't. Br. 16).

But the government totally overlooks the fact that in the first paragraph of the quoted portion (Gov't. Br. 15, R. 14), the court told the jury that to him, the trial judge, the words "*prima facie* case" signified a case proved beyond a reasonable doubt. The government admits (Gov't. Br. 16) that the judge's language, together with his failure to direct a verdict, indicated to the jury that the government had proved a *prima facie* case. But taken with the judge's statement that a *prima facie* case is a case proved beyond a reasonable doubt (R. 14, Pet. 26) we can only arrive at the inference that when the judge let the case go to the jury, he in effect told the jury that in his opinion the government had established its case beyond a reasonable doubt.

III.

The trial judge erroneously advised the jury that the defendant alone could appeal from its verdict (Gov't. Br. 17-18, Pet. 27-29).

The government contends that the court corrected his previous error in advising the jury of the fact that the government could not appeal from the jury's verdict, by his subsequent remarks (R. 16).

The court punctuated those remarks with his assurance to the jury that he had never been reversed in a criminal case (R. 16). He previously had told the jury that he could direct a verdict in favor of the defendant (R. 14) but that a *prima facie* case, *i.e.*, one which he permitted the jury to act upon, was to him, the judge, a case proved beyond a reasonable doubt (R. 13-14).

Thus these prophylactic utterances told the jurors that whenever the trial judge had let juries in other cases decide the issues he had been right in his appraisal. That is, whenever he had let a case go to the jury, the defendant was really guilty; witness his record on appeal.

United States v. *Martel,* 104 F. Supp. 140, cited by the government (Br. 17) was, as we observed in our petition (Pet. 28) different from the case here. In the *Martel* case, the judge did not emphasize, or even allude to the fact that the defendant could appeal *while the government had no such right.* Thus the government's quotation from that case has no relevance to this appeal.

CONCLUSION.

The government gratuitously advises the Court that the petition presents no important question of law nor any conflict of decisions (Gov't. Br. 11). We respectfully urge that the decision of the Court of Appeals for the Seventh Circuit is in serious conflict with the decisions of this Court and with the courts of other circuits as noted in our petition. We further urge that the fact that eminent judges are driven to admit that the proper application of evidence upon matters basic to conspiracy prosecutions "is not clear in the books" (*United States* v. *Dennis*, 183 F. 2d 201, 230), belies the government's contention that nothing of importance is raised by our petition.

We respectfully submit that the petitioner was deprived of a fair trial, in accordance with due process of law, that the trial judge in effect deprived the petitioner of a trial by jury by taking certain jury questions away from the decision of the jury, and by expressing his opinion on ultimate issues of the case; that a number of the questions here are novel and important in the administration of criminal justice in the Federal Courts; and that, therefore, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner.

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